RECENT TENDENCIES IN AMERICAN CRIMINAL LEGISLATION

No question is more frequently put to penologists than this: "Is crime increasing in the United States?" The uniform response from those who do not depend upon their imagination, but upon facts for their conclusions, is that there are no reliable statistics covering the entire country, upon which to base an answer. Two elements enter into the question of the nature and volume of crime in any country. First, what is the character of the laws constituting crimes and offences? Secondly, in what manner and to what extent are they executed? Police, judicial, and prison statistics are of small value in showing the amount of crime in a community, and its movement and fluctuation, unless we know the character of the laws chosen in different communities for comparison, and whether arrests are stimulated by a premium on police vigilance, or by the fee system of recompensing sheriffs. The fact, that in one community laws are vigilantly executed may make it compare very unfavorably, if statistics alone are consulted, with a community where the same laws are not enforced. A single change of law, by which sheriffs are paid salaries, instead of fees, has reduced materially the prison population in many counties. Except in a few States where statistics are carefully prepared, and as carefully analysed, we are not in a condition to draw inferences as to the fluctuations of crime with reference to the population.

With reference, however, to the sentiment of the community as to the ethical and legal value of different offences, and the weight of penalties attached to them, we are in a much better position to form judgments. American States are no longer dependent upon traditions, embodied in the common law, as to their moral estimates of different offences. In the Federal Courts, the common law is not recognized as authoritative with reference to offences, and in most of our States, statute law has taken its place. The development of our civilization has been so rapid and complex, and so many new relations have been created, that early categories of offences do not fit modern conditions. The stealing of a box of

candles, which could easily be dealt with a hundred years ago, is a different problem from stealing the same amount of light from an electric wire. The march of invention, the introduction of new elements, involving both value and danger to society, whether they be automobiles or explosives, anæsthetics or nickel-in-the-slot machines, are registered as certainly in the statutes of the forty-five States, as they are in the patent office, or in the annals of discovery. Life and property assume new aspects, and, in the opinion of legislators, require new protection. The multitude of laws enacted annually or biennially illustrates barometrically, the fluctuations of public sentiment as to the nature and ethical value of offences. Many of these laws relate to matters which are purely civil in their character, but the habit of attaching penalties for neglect or omission, or to deter from commission of unlawful acts, has largely obliterated the distinction between the civil and penal code. As the distinction between a felony and a misdemeanor has been so far removed, that the difference between them in most States is determined simply by the place in which the punishment is endured—for a felony in an institution under the State, and for a misdemeanor, in an institution administered by a city or county—so the only practical distinction that remains between the civil and criminal code must be found, not in the definition of the offence, but in the penalties that are attached to them. Even States which have formal penal codes, in which every criminal offence is supposed to be catalogued, have been unable logically and symmetrically, to carry out this idea. In the State of New York, a large number of offences created by the Legislature, for example, those against the sanitary code, have not been incorporated in the penal code.

Though we cannot say that the volume of crime is increasing in the United States, we have evidence in bulky volumes of statutes that the categories of crimes and offences are constantly multiplied. In 1898, I prepared for the International Prison Commission, a volume on "New Legislation Concerning Crimes, Misdemeanors, and Penalties." This report embraced only the State and Federal legislation for the years 1897–1898. But laws and penalties multiply so rapidly that only consecutive annual reviews enable the penological student to observe the movement, morally or geographically,

of current legislation. The material for such an annual review is now furnished by the New York State Library, of which Mr. Melvil Dewey is the director, in the form of a comparative summary and index of State legislation of each year, edited by Robert H. Whitten, sociology librarian. There are few places in the country where a reader, consulting this index, can find the session laws of all the States; but the value of the index is much enhanced by a review of legislation, in a separate volume, by experts in different departments, who have before them the full text of all the laws embraced in their subjects. When the Federal laws are finally included, we shall have a very complete conspectus of the movement of legislation in this country.

With such material at his command, it is now possible for the student of comparative legislation to discover the genesis and development of the laws, whether they are local or general, and the direction in which they move from State to State. Most Legislatures in this country are fairly representative of the constituencies which create them, and the body of legislation may be said to represent likewise the public sentiment of the country as to standards of action, conduct, and responsibility. The subsequent history of these laws cannot so easily be determined. Sometimes reactions and protests of public opinion can be promptly seen in amendments and repeals, but many a law is doomed to die on the day of its birth. The silent indifference of the public as effectually smothers it as if it had been buried in a coffin under the Statue of Liberty.

The most obvious tendency of criminal, as of all other, legislation in this country, is the tendency to "increase and multiply." We speak of an epoch of law-breaking, may we not speak of an epidemic of law-making? Governor Pennypacker, of Pennsylvania, in his message of January, 1903, calls attention to this tendency:

"The modern tendency to invent new crimes ought to be curbed. To obliterate the marked line which distinguished between mere breaches of contract and crimes, is to bring the law itself into disrepute. To threaten with imprisonment him who has filled a bottle entrusted to him, the contents of which he has bought, or him who sells a railroad ticket, the evidence of a right of transportation, for which he has paid, is no doubt a convenience to corporations and others in enforcing their contracts, but it takes from the prison much of its effect as a restraint on those who do evil. Juries refuse to convict where they

believe the charge ought not to be sustained, even though the facts come within the terms of a statute, and thus men are taught to disregard the law. . . . "

While Governor Pennypacker regrets the excess of legislative zeal in imposing penalties for trifling offences, five Governors of States called attention, last year, in their messages to the Legislature to the failure of their States to leave the punishment of crime to the regular and orderly processes of the law, and to the further neglect to apprehend and punish the leaders of mob violence. Governor Jelks, of Alabama, spoke with great vigor:

"The excuse urged for lynching, for crimes which are common in the South, is no excuse at all. The man who criminally assaults a woman in this State, if allowed to be tried, will certainly get his just deserts at the hands of the law. Other classes of citizens, for other crimes, escape the just penalty for the violation of the law, but the negro, and for the gravest of all crimes, never escapes. There have been quite a number of lynchings since you met here. In the last year and a half, or during my official incumbency of this office, I recall five such crimes. One of these lynchings was for the crime of criminal assault. So easy was it for the mob spirit to get away from the original cause for provoking that spirit, that three of the latest of these crimes were for other offences, and two for no offence at all. In one county, near the Capital City, a lot of self-constituted guardians of the peace and honor of their homes, in an attempt to mob a negro, who had committed an offence, which, under the law, could not have called for a sentence of more than two years, took his brother, innocent of any offence at all, and hanged him. I am glad to be able to say to you that there was a just judge and a sufficient number of law-abiding citizens to give these men, or some of them, a term in the penitentiary. I believe these are the first like offenders to serve the State since the great war. No man had heretofore gone to the penitentiary for lynching a negro. It is our shame! Now that the law has begun to act, let law-abiding citizens and just judges see to it that other murderers go not unwhipped of justice hereafter. Following this case, a mob in Pike County took a negro away from a constable—I know not with what difficulty—and lynched him. His offence was probably swearing contrary to one of his white neighbors in a justice trial on a proof of character. This was a cold-blooded murder, and without excuse at all. The murderers go about. None of them will be hanged as they should be. Another case grew out of an assault to murder, and still another in a hunt for a rapist, the murderous mob found the wrong man. The man the outlaws killed in this last case had never seen the rapist's victim or heard of her. Human life is about as cheap in Alabama as it is anywhere. One or two Southern States vie with us, and may overreach us, in the low price we put on it, but we are shamefully near the bad eminence. And sheriffs can prevent this lawlessness in most cases."

Governor Aycock, of North Carolina, informed the Legislature that "during the past two years there have been eight lynchings

in the State; three for murder, one for attempting to poison, three for rape, and one for assault with intent to rape. The resort to this practice is neither justified by reason, nor do the results attained by it show its efficacy. The crimes for which this summary punishment is meted out do not decrease. The safety of every citizen is better guaranteed by the orderly execution of the laws of the land." Governor Aycock asked for legislative relief in the direction of "some means for the efficient, certain, and speedy trial of crimes, and at the same time to make such provision as will protect every citizen, however humble, however vicious, however guilty, against trial by the mob."

Governor White, of West Virginia, said: "Lynching is a cowardly crime, subversive of social order, productive of no good result, and leads to other crimes, by making criminals of those who heretofore have been law-abiding citizens. It was no surprise to those who saw the spirit with which the Brooks lynching was regarded by the good people of Elkins and surrounding country, that a second horrible lynching took place a year later in the same county. There was involved in neither of these lynchings the honor of womanhood, which is so often urged as an excuse for lynching. They were simply cold-blooded lynchings for the sake of lynching."

Governor White was not prepared to suggest the form of remedial legislation, but called attention to the need of conferring additional powers upon the Governor, such as the right to remove sheriffs or prosecuting attorneys who fail to fulfill their duties. Governor Sayers, of Texas, likewise pointed out the powerlessness of the Governor when local officials are weak.

The only legislative response to these messages, during the last year, has been in the State of West Virginia, which adopted a joint resolution reflecting the spirit of the Governor's message and saying: "It is the sense of this body that the rights of our citizens should be held inviolate, and that every man accused of crime should have a fair and impartial trial by a jury of his peers, and that those who would recklessly and grossly deny this right, should be brought to swift and speedy justice." The resolution empowers the Governor, with the aid of the attorney-general, to take such means as in his judgment are necessary to bring the guilty parties to justice.

Connecticut passed a law making cities or boroughs liable for

injuries caused by mobs. Kansas has fixed the penalty for lynching from 5 years to life imprisonment, accessories after the fact to be imprisoned from 2 to 21 years, the sheriff's office to be vacant after lynching, but the Governor may reinstate him.

Passing now to offences classified as "Crimes against the Government," we may still trace the influence of the assassination of President McKinley, in laws against anarchy and for the protection of the President and other executive officers. In 1901, no laws were passed on either of these subjects, but in 1902, the death of the President was promptly reflected in the mirror of legislation. Iowa, New Jersey, New York, and Ohio, all passed laws growing out of this event, and in 1903, California, Connecticut, Washington, and Wisconsin. The New York law, of 1902, has served as a model for the States of Californian, Washington, and Wisconsin. It is made a felony to commit any crime against the person of the President or Vice-President of the United States, the Governor of any State or Territory, any United States Judge, or the secretaries of any of the executive departments of the United States. It is likewise, as in New York, made unlawful to teach or spread such doctrine. Criminal anarchy is defined to be " the doctrine that organized government should be overthrown by force or violence." Connecticut has a new and independent law of its own, limited to three lines. "Every person who shall wilfully and maliciously attempt to cause the death of the President of the United States or of any foreign ambassador, accredited to the United States shall suffer death."

Bribery is an insidious offence, which changes its form as often as "the old man of the sea," and provisions against it are found very frequently in the legislation of the last three years. The new Nevada law, declaring all forms of felony, is interesting, because of the great pains taken to define and to hunt down the offence under whatever disguise it may assume. Any form of remuneration, whether a money gift or payment, release of debt, payment of board, lodging or transportation, the furnishing of food or clothing, the powers of giving employment, the increasing or maintaining of wages, the promise of appointment to any public office or position, either for the voter, or for any other person, the swapping of votes for candidates, may constitute bribery, and the voter, delegate, or member of the Legislature, who accepts any such consideration, is con-

sidered guilty of bribery together with the person taking the offer. It is likewise made bribery for a candidate for United States Senator to pay the campaign expenses of a candidate for the Legislature, or for a candidate to accept such payment, or for an employer to threaten an employe with loss of employment if he votes or fails to vote for a certain candidate or measure. The penalty for these various forms of bribery, is imprisonment from one to eleven years and forfeiture of office. It would be interesting to know why the maximum is made eleven instead of ten years, in usual deference to the decimal system.

That the American people are not devoid of symbolic reverence and patriotic sentiment, is seen in the crusade against the use of the United States flag for advertising purposes. In 1901, nine States passed such laws; in 1902, three States; in 1903, five States. There are also laws requiring it to be raised over school houses and over polls and election places.

Passing now to crime against public order and security, we find that an endeavor to extend the area of prevention as to offences resulting from the use of weapons, is the subject of two Governors' Messages, and of laws in seven States during the past year. All the laws on this subject within the last three years have been passed in Southern or Western States, an indication that habits and customs which have long been familiar in frontier life, in which the individual carried his protection with him, must give way to the social protection furnished in well-organized communities.

Vagrancy is an affliction which has prompted legislation in six States in 1903. Evidently, it is getting more and more apparent in certain States, that methods of dealing with this offence, heretofore in use, have been inadequate, especially under merely municipal and county regulations. Most of these laws provide for fuller and more accurate definition of vagrancy, and in Vermont, the definition is made to cover train-riding, but the punishment in both cases is still a brief term of imprisonment in the county jail. Arkansas has found that imprisonment in the county jail from thirty to ninety days has been ineffectual in dealing with vagrancy even though the law required them to be fed on bread and water alone during half of their imprisonment. It is now planning to work them upon the public roads of the counties or cities in which

they are convicted. New Jersey has passed a law that magistrates may commit disorderly persons to the State penitentiary as well as to a county jail. This applies also to tramps. If the New Jersey penitentiaries provide sufficient work for such offenders, they will be less likely to wander into that State.

Turning now to crimes against persons, I called attention, in a review of criminal legislation for 1901, to the significant fact that a single crime committed in the State of Nebraska, namely the kidnapping of a boy, to obtain a ransom from his wealthy father, had given an impulse to legislation over the whole country. In 1901, twenty-four States passed laws relating to kidnapping and abduction. In 1902, five States passed similar laws, all traceable to the same event. The alarm and indignation occasioned by this crime seems to have subsided. No laws were passed on the subject of kidnapping in 1903. Kansas has declared blackmail to be deemed felony, punishable by imprisonment from one to five years and a fine not exceeding a thousand dollars. In the criminal code of Alaska, adopted by the United States in 1899, the punishment for blackmail ranges from three months to one year in the county jail, or six months to five years in the penitentiary.

As to homicide, New Hampshire, in 1903, abolished the death penalty for murder in the first degree, unless the jury affixed the same to the verdict; otherwise the sentence is for life imprisonment. In Washington, the penalty for murder in the second degree, which formerly ranged from ten to twenty years, now has a life maximum.

As to crimes against property, the student of comparative legislation in the United States is impressed with the multitude of laws in recent years to prevent the theft of electricity, or interference with electric lines or instruments. In 1897 and 1898, laws for the protection for this new form of property were passed in thirteen States. In 1901, laws were passed in ten States. In 1902, the off-year in legislation, five laws were passed, and in 1903, fourteen.

The advent of a new form of industry, that of the raising of ginseng for the Chinese market, where it has a religious as well as a therapeutic value, was signalized in Kentucky, in 1892, by the passage of a severe law against trespass upon ginseng gardens, making the offense a felony, with penalty of from one to three years imprisonment in the penitentiary. New York now follows in the

wake of Kentucky by defining the word "building" in the chapter of the penal code relating to burglary, so as to include enclosed ginseng gardens. As thus defined, the stealing of ginseng would constitute burglary in the third degree, and the penalty imprisonment not exceeding five years.

A vast number of penalties are attached to laws, which in the new State Library Index to Legislation, are not entered under "Crimes and Offenses." These cover miscellaneous police regulations, the regulation of gambling, bucket shops, horse racing, prize fighting, shows, and exhibitions. The growth of the humane sentiment is seen in laws passed for the protection of animals and children. Sixteen States passed laws regulating automobiles. A characteristic feature of modern legislation is numerous laws prohibiting the sale of liquor or cigarettes to minors. Many laws have been passed for the regulation of the practice of medicine, eight of which relate to osteopathy. Twenty-one laws relate to the adulteration of food, with penalties attached.

The most marked feature of the correctional legislation of the year is the impulse given to probation and to the establishment of Juvenile Courts. Laws establishing such courts or amending existing legislation, were passed in Colorado, Indiana, Michigan, Minnesota, Missouri, New Jersey, New York, Oklahoma, Pennsylvania, and Wisconsin. Several other States have passed laws relating to juvenile offenders in different forms. Probation laws have been passed in seven States. It is gratifying to note the progressive tendency of legislation, with reference to conditional liberation, both before and after imprisonment.

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